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No. 90-6113

In The

Supreme Court of the United States

October Term, 1991

RANDALL D. WHITE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause requires the prosecution to show that a child declarant is unavailable to testify before the child's out-of-court statements may be admitted against the defendant at trial?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Statement of the Case contained in Petitioner's brief is generally correct. However, Respondent wishes to correct one inaccuracy, as well as recite a few additional salient facts which are contained in the record.

First, Petitioner states that "[f]ollowing the admission of the hearsay testimony, S.G. was brought to the courtroom for the purpose of testifying, but did not take the stand." (Brf. for Pet. at 2) This statement is not entirely correct. Following the admission of the testimony of the baby sitter, Toni DeVore (Vol. VI, R. 6-37), Dr. Michael Meinzen (Vol. VI, R. 43-63), and S.G.'s mother, Tammy Grigsby (Vol. VI, R. 64-97), the State attempted to call S.G.

to the stand. (J.A. 12) When she failed to take the stand at that time, the State instead called Officer Terry Lewis. (J.A. 12) After Lewis testified, the State attempted to recall S.G. (J.A. 13) When S.G. again failed to take the stand, the case was recessed until the following morning. (Vol. VI, R. 123) At that time, the State called the emergency room nurse, Cheryl Reents. (Vol. VII, R. 5-16)

The Petitioner's Statement of the Case also fails to apprise the Court of other evidence in the case which corroborated S.G.'s hearsay statements. Although Petitioner states that the baby sitter was awakened by S.G.'s screams at 4:00 a.m., the evidence also showed that S.G.'s mother observed Petitioner leaving a tavern at approximately 3:30 a.m. that morning. (Vol. VI, R. 73-74) The tavern was only a five-minute drive from the Grigsby residence. (Vol. VI, R. 75)

Moreover, the baby sitter testified that S.G. did not have any marks on her face or neck when she was put to bed the previous evening. (Vol. VI, R. 21) However, the following morning, she noticed a scratch on S.G.'s neck (Vol. VI, R. 21)

S.G.'s mother also testified that she noticed S.G. had bruises or red marks on her neck which were not there the previous night when she left the house. (Vol. VI, R. 81) Ms. Grigsby also checked S.G.'s vaginal area and found that it was "a little red." (Vol. VI, R. 81)

Officer Lewis noticed a small cluster of fresh scratches on the right side of S.G.'s mouth. There were also two long parallel scratches on the left side of S.G.'s

neck. (Vol. VI, R. 112-13) The scratches had actually broken the skin, but were no longer bleeding. (Vol. VI, R. 113)

Nurse Reents also testified as to the bruising on the left side of S.G.'s neck. (Vol. VII, R. 12) This was confirmed by Dr. Meinzen who described the bruising as extending over S.G.'s sternocleidomastoideus muscle. (Vol. VI, R. 51-52)

SUMMARY OF THE ARGUMENT

I. This Court has closely scrutinized the admission of hearsay which is most analogous to *ex parte* affidavits or depositions and has concluded that such evidence is merely "a weak substitute for live testimony" which offends the purposes of the Confrontation Clause. If, however, hearsay has evidentiary value independent of whatever testimony the declarant may later give in court, and does not bear a notable similarity to *ex parte* affidavits or depositions, as is the case with custodial confessions, a separate inquiry into unavailability is not mandated under the Confrontation Clause. *United States v. Inadi*, 475 U.S. 387 (1986); *Lee v. Illinois*, 476 U.S. 530, 548 n.2 (1986) (Blackmun, J., dissenting).

The hearsay statements admitted in this case have never been considered "weak substitutes for live testimony." Both spontaneous declarations and statements made for purposes of medical treatment gain their probative value from the circumstances in which they were made. Consequently, the use of such statements has never

been conditioned upon the unavailability of the declarant.

Under the common law, the use of many of today's most common hearsay exceptions was not conditioned upon a showing of unavailability. Moreover, Federal Rule of Evidence 803 includes 24 exceptions similarly not conditioned on such a showing. If the Petitioner's interpretation of the Confrontation Clause were correct – *i.e.*, that the hearsay statements of a non-testifying child victim in a sexual abuse case may be admitted only upon a case-specific finding of unavailability – the use of all the common-law hearsay exceptions not conditioned upon a showing of unavailability, as well as all federal and state exceptions based thereon, would violate the Constitution. Such an approach could lead to a quagmire, in that courts would be forced to develop a separate body of hearsay law, applicable only in criminal cases and only when the prosecution offers the hearsay.

Moreover, an unavailability requirement for all hearsay exceptions used in child sexual abuse cases would offer no significant benefit. First, unless the prosecution simply fails to produce an available child declarant for trial, the rule never actually serves to exclude evidence. In addition, the Compulsory Process Clause would assist any defendant in obtaining the testimony of a child declarant whose hearsay statement was admitted against him. Finally, most states have either hostile witness provisions or rules comparable to Federal Rule of Evidence 806 which allows the defendant to examine, as if under cross-examination, any hearsay declarant he may call as a witness.

An unavailability rule would, however, impose significant burdens on both the criminal justice system and the prosecution. First, a rule requiring a determination of unavailability, every time the prosecution seeks to admit a child's hearsay statement, automatically adds another avenue of appellate review for defendants in the ever-growing number of sexual abuse cases. Moreover, in every such case, the prosecution would be required to ensure the child victim's continuing availability for trial. In many sexual abuse cases, if the child manages to hold up emotionally until the time of trial, prosecutions are abandoned or result in generous plea agreements simply because the child either "freezes" when he or she gets to court, or is unable to give adequate testimony on the witness stand.

Several important state interests would be furthered if the prosecution is not constitutionally required to produce an available child victim for trial before introducing his or her out-of-court statements in a sexual abuse case. Indeed, this would be accomplished without sacrificing the Confrontation Clause's truth-seeking function.

First, if the state is not required to produce available child declarants, the state interest in preventing trauma to child witnesses in abuse cases is obviously advanced. At the same time, however, the accuracy of the evidence before the trier of fact is enhanced, thereby advancing both the societal interest in accurate fact-finding and the truth-seeking goal of the Clause. Indeed, the Court has recognized that "where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve*

the Confrontation Clause's truth-seeking goal." *Maryland v. Craig*, 497 U.S. ___, 110 S.Ct. 3157, 3169 (1990).

There are other compelling reasons why an unavailability requirement for child hearsay declarants in sexual abuse cases would impede accurate fact-finding. Children may have difficulty testifying at trial due to inferior long-term and short-term memories. Moreover, a child may experience guilt or fear when testifying, particularly when the defendant is a parent or relative who may have, over time, extracted a promise of secrecy from the ambivalent child by using coercion, threats, subtle persuasion, or bribes. Thus, the account given closer in time to the actual event is likely to be the more accurate. Additionally, given the impressionable nature of children, use of the prior, more contemporaneous account decreases the chances that any intervening outside influence by an adult was exerted over the child. Indeed, due to the unique circumstances surrounding a child's in-court testimony, especially in a sexual abuse case, his or her out-of-court statements are comparable, in terms of probative value, to the statements of co-conspirators analyzed in *Inadi*.

II. If proof of unavailability is required for admission of spontaneous declarations and statements made to medical personnel for purposes of treatment or diagnosis, the state made a "good-faith effort" to call the declarant as a witness in this case, only to find that she was emotionally or psychologically "unavailable."

If, as Petitioner suggests, the trial court was obligated to make a "case-specific finding of necessity," the State should be given the opportunity to prove S.G.'s

unavailability on remand before Petitioner is granted a new trial.

ARGUMENT

I. THE CONFRONTATION CLAUSE DOES NOT REQUIRE A SHOWING OF UNAVAILABILITY AS A CONDITION TO THE ADMISSION OF A CHILD VICTIM'S STATEMENTS IN A SEXUAL ABUSE PROSECUTION WHEN INTRODUCED UNDER MOST RECOGNIZED HEARSAY EXCEPTIONS.

A. The Primary Object Of The Confrontation Clause Was To Prevent Trial By *Ex Parte* Affidavit And Other Weak Substitutes For Live Testimony.

The right of confrontation originated in response to the practice of trying criminal defendants solely on the basis of *ex parte* affidavits or depositions, in lieu of a personal examination and cross-examination. Defendants were denied not only the opportunity of testing the recollection and sifting the conscience of a sworn witness before the trier of fact, but of the symbolic act of challenging their accuser face to face in an open and even contest in a public trial. *See generally* 1 J. Stephen, *A History of the Criminal Law of England* 326 (1883).

An *ex parte* affidavit or deposition is generally nothing but a less desirable substitute for live testimony. Either can be as detailed and sweeping as the examination of a live witness. Both are usually created in contemplation of litigation and, therefore, are subject to the self-serving influences associated with preparing for trial.

Similar factors come into play when the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial. *See, e.g.*, Fed. R. Evid. 804(b)(1). Like an affidavit or deposition, former testimony is merely a weaker substitute for live testimony. Even if the declarant was under oath and subject to cross-examination at the time of his former testimony, the trier of fact's opportunity to observe his or her demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Fed. R. Evid. 804(b)(1) advisory committee's note.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court examined the unavailability requirement found in a long line of Confrontation Clause cases involving former testimony.[1] The Court summarized this case law, stating that "[i]n the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65.

Six years later, the Court disavowed any suggestion that, under *Roberts*, no out-of-court statement would be admissible without a showing of unavailability. In *United States v. Inadi*, 475 U.S. 387 (1986), a case involving the use of co-conspirator statements of a non-testifying declarant, the Court's first step was to limit *Roberts* to the particular situation presented by it – the State's attempted use of the preliminary hearing testimony of a witness not produced

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[1] *See Reynolds v. United States*, 98 U.S. 145 (1879); *Mattox v. United States*, 156 U.S. 237 (1895); *Motes v. United States*, 178 U.S. 458 (1900); *Barber v. Page*, 390 U.S. 719 (1968); *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

at the defendant's subsequent state criminal trial. 475 U.S. at 393. The Court reasoned that former testimony seldom has evidentiary value of its own, but is intended solely to replace live testimony. *Id.* at 394. If the declarant is available and the same information can be presented in the form of live testimony, there is little justification for relying on the weaker version. *Id.* The Court continued that "longstanding principles of the law of hearsay, also applicable to Confrontation Clause analysis, favor admitting the better evidence." *Id.* at 394. If, however, the declarant is unavailable, no "better" version of the evidence exists, and, out of necessity, the law allows the admission of the former testimony as a substitute for the live testimony. *Id.* at 394-95.

The situation is quite different when a declarant's in-court testimony would fail to reproduce a significant portion of the evidentiary value of his out-of-court statements. For example, because the statements of co-conspirators are made while the conspiracy is in progress, the statements provide evidence of the conspiracy's context that cannot be duplicated, even if the declarant testifies to the same matters in court. *Inadi*, at 395-96. This is especially true in that the declarant and the defendant will have changed from partners in crime to suspects or defendants in a criminal trial, each possessing information potentially damaging to the other.[2] *Id.* at 395. In

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[2] Petitioner's attempt to distinguish *Inadi* solely on the basis of the special relationship between co-conspirators is superficial at best. He ignores the Court's core point in the case which is that co-conspirator statements derive much of their probative value from the fact that "they are made in a context very different from trial." 475 U.S. at 396.

other words, because it is made in a context very different from trial, there is a necessity[3] for resorting to the out-of-court account.

Like the out-of-court statements of co-conspirators, virtually all admissible hearsay, other than former testimony, has irreplaceable probative value independent of whatever testimony the declarant may later give at trial. The two hearsay exceptions utilized in this case are illustrative of this point.

A spontaneous declaration or excited utterance gains its probative significance from the consideration that in the stress of nervous excitement, the reflective faculties are stilled and the utterance becomes the unreflecting and sincere expression of one's actual impression and belief. 6 J. Wigmore, *Evidence*, § 1749, at 199. Accordingly, such an extrajudicial assertion is better than is likely to be obtained from the same person on the stand, and it follows that unavailability of the witness need never be shown under this exception. *Id.* § 1748, at 199.

Statements made for purposes of medical treatment also gain their probative value from the fact that they are made at a time when circumstances lessen the possible inducement to misrepresent. Their value rests on the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the

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[3] "Necessity" in the sense that the declarant's out-of-court assertion "may be such that we cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources." 5 J. Wigmore, *Evidence*, § 1421 (Chadbourn rev. 1974) (emphasis in original).

accuracy of the information he provides the physician.[4] E. Cleary, *McCormick on Evidence* § 292, at 839 (3d ed. 1984). Statements of physical or mental condition made on the stand, where there is ample opportunity for deliberate misrepresentation and small means for checking it with other evidence or testing it by cross-examination, are comparatively inferior to the extrajudicial statements made to a physician. Accordingly, it follows that unavailability of the declarant is not a condition precedent to the use of such statements. 6 J. Wigmore, *supra*, § 1714, at 90.

Courts have drawn a distinction between statements made to a physician consulted for purposes of treatment and those made to a physician for purposes of medical diagnosis, including those made to enable the doctor to testify. The distinction is based on the conclusion that where the declarant does not anticipate that his treatment's effectiveness will depend on the truthfulness of his statements, the rationale underlying the exception does not exist. E. Cleary, *supra*, § 293, at 841. This distinction, however, does not warrant treating such statements

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[4] Because of the strong assurance of reliability, courts have expanded the exception to include statements concerning past symptoms if regarded by the patient as related to treatment. *Roosa v. Boston Loan Co.*, 132 Mass. 439 (1882); *Kennedy v. Upshaw*, 66 Tex. 442, 1 S.W. 308 (1886); *Missouri, Kansas & Texas Railway Co. v. Dalton*, 56 Tex.Civ.App. 82, 120 S.W. 240 (1909); *Meaney v. United States*, 112 F.2d 538 (2d Cir. 1940); *see* Fed. R. Evid. 803(4). In some cases, the special assurance of reliability – the patient's belief that accuracy is essential to effective treatment – also applies to statements concerning cause. *Shell Oil Co. v. Industrial Commission*, 2 Ill.2d 590, 119 N.E.2d 224 (1954); *see* Fed. R. Evid. 803(4).

differently with respect to the requirement of unavailability. *See* Fed. R. Evid. 803(4) (availability of declarant immaterial regardless of whether statement is made for purposes of diagnosis or treatment). Although the probative value of statements made only for the purpose of enabling the physician to testify does not rest on the same rationale underlying statements made for purposes of treatment, the statements are still made in a "context very different from trial" and derive their significance from the circumstances in which they were made. As stated above, statements of pain or symptoms made in court, where there is abundant opportunity for fabrication and limited means for effectively exposing inaccuracies through cross-examination, are proportionately inferior to extrajudicial statements made to a physician, even if solely for the purpose of enabling the doctor to give his expert opinion later at trial. The declarant is less likely to contrive symptoms when consulting a member of the medical profession who he or she realizes has the ability to evaluate the accuracy of the statements made. *See* E. Cleary, *supra*, § 293, at 842 ("[t]he general reliance upon 'subjective' facts by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms.").

There is, however, a type of admissible hearsay which – although it has independent evidentiary value derived from the context in which it was made – bears such similarity to *ex parte* affidavits or depositions as to call for close examination under the Confrontation Clause: third-party custodial confessions. Custodial confessions can include all the detail of an affidavit or

deposition, and like the affidavits and depositions used to convict during the seventeenth century, they are ordinarily obtained *ex parte*, in contemplation of litigation, and with the participation of the prosecution. Since a custodial confession shares so many of the characteristics of an affidavit or deposition, it, like former testimony, is nothing more than a "weak substitute for live testimony" and is thus subject to an unavailability requirement. *See Lee v. Illinois*, 476 U.S. 530, 548 n.2 (1986) (Blackmun, J., dissenting) (" . . . [A] specific showing of unavailability is not always required. I nonetheless assume, for purposes of discussion, that in relevant respects Thomas' custodial confession is more like the prior judicial testimony at issue in *Roberts* than like the contemporaneous co-conspirator statements involved in *Inadi*, and thus that both *Roberts* requirements had to be satisfied").

In short, this Court has closely scrutinized the admission of hearsay which is most analogous to *ex parte* affidavits or depositions, the quintessential "weak substitutes for live testimony" which the Confrontation Clause was developed to prevent. If, however, hearsay has evidentiary value independent of whatever testimony the declarant may later give in court, and does not bear a notable similarity to *ex parte* affidavits or depositions as is the case with custodial confessions, a separate inquiry into unavailability is not mandated under the Confrontation Clause. *See also* Haddad, *The future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Line of Confrontation Decisions*, 81 *J.Crim.L. & Criminology* 77, 82 (1990). The hearsay admitted in this case fulfills both criteria.

B. Under the Common Law, the Use of Many of Today's Frequently Used Hearsay Exceptions Was Not Conditioned Upon the Unavailability of the Declarant.

This Court has held that although the Confrontation Clause differs in significant ways from the common-law rule against introduction of hearsay, the two "stem from the same roots," (*Dutton v. Evans*, 400 U.S. 74, 86 (1970) (*plurality opinion*)), and "protect similar values." *California v. Green*, 399 U.S. 149, 155 (1970). Accordingly, analysis under the Confrontation Clause "is informed . . . by hearsay principles developed over time by courts and legislatures." *Lee v. Illinois*, 476 U.S. at 551 (Blackmun, J., dissenting).

Under the common law, the use of many of today's most common hearsay exceptions was not conditioned upon a showing of unavailability of the declarant. Only if the exception originated as a result of necessity, due to the great difficulty or impossibility of proving certain facts by living witnesses, was unavailability required.[5]

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[5] Two hearsay exceptions which have historically required unavailability are dying declarations and declarations about family history. *See* Fed. R. Evid. 804(b)(2) and 804(b)(4). However, both exceptions have independent probative value derived from the circumstances in which they were made and, accordingly, would not constitutionally require a showing of unavailability under the Court's reasoning in *Inadi*.

An anomaly is the declaration against proprietary or pecuniary interest which gains its evidentiary value from the consideration that a statement asserting a fact against one's interest is unlikely to be deliberately false or heedlessly incorrect. 5 J. Wigmore, *supra*, § 1457. Although the unavailability

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For example, the hearsay exception for public records was not conditioned upon a showing of unavailability at common law. Given the volume of business in public offices, the official written statement of a public official, for whom it would also be practically inconvenient to regularly appear in court, is thought to be more reliable than his present memory if he were to take the stand. E. Cleary, *supra*, § 315, at 889. Although necessity plays a part in the rationale underlying this exception, the overriding impetus appears to have been the preference for resorting to the earlier statement, thought to be more valuable than a later statement made by the declarant at trial. Consequently, unavailability was not a requirement.

Although the hearsay exception for regularly kept records included a requirement of unavailability at common law,[6] by the middle of the twentieth century, that

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requirement at common law, apparently based on the impossibility of obtaining the declarant's testimony on the stand, has continued and is now largely standardized, its logic has been questioned in that the rationale which admits other hearsay statements without regard to the availability of the declarant seems equally applicable to declarations against interest. *See, e.g.*, 5 J. Wigmore, *supra*, § 1455, at 324; Note, *Declarations Against Interest: A Critical Review of the Unavailability Requirement*, 52 *Cornell L. Rev.* 301 (1967). Additionally, under the reasoning of *Inadi*, a showing of unavailability would not be constitutionally required for the use of statements falling under this exception.

[6] At common law, if the person who made a business record were present as a witness, the record could be used to refresh his recollection, or if still unable to recall the facts, his testimony might qualify the record as past recollection

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requirement had virtually disappeared for the same reasons it was disregarded in the public records exception. *E.g., Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co.*, 18 F.2d 934, 938 (2d Cir. 1927) ("It ought to appear that . . . the missing entrants, if called, would in the nature of things have no recollection of the events recorded and could do no more than corroborate the existing testimony as to the course of business in which they had a part.").

Termed in the Advisory Committee Notes a "synthesis" of the common-law hearsay exceptions in which unavailability of the declarant is irrelevant, Federal Rule of Evidence 803 includes 24 exceptions similarly not conditioned on such a showing. *See* Fed. R. Evid. 803(1)-(24). Only five of the hearsay exceptions recognized in the federal rules require the unavailability of the declarant. *See* Fed. R. Evid. 804(b)(1)-(5).

If the Petitioner's interpretation of the Confrontation Clause were correct – *i.e.*, that the hearsay statements of a non-testifying child victim in a sexual abuse case may be admitted only upon a case-specific finding of unavailability – the use of all the common-law hearsay exceptions not conditioned upon a showing of unavailability, as well as all federal and state exceptions

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recorded. If, however, the declarant were unavailable, then these avenues to admissibility for the business record could not be used. Thus, a need for a special hearsay exception for business records arose. As sometimes happens, the reason why the rule came into existence was incorporated into the rule as a requirement. E. Cleary, *supra*, § 311, at 880.

based thereon, would violate the Constitution. Commentators have predicted that, generally, such an approach could lead to a "quagmire," in that courts would be forced to develop a separate body of hearsay law, applicable only in criminal cases[7] and only when the prosecution offers the hearsay. *See* Haddad, *supra*, 81 *J.Crim.L. & Criminology* at 80.

This Court should be most reluctant to utilize the Confrontation Clause as a vehicle for examining established evidentiary law. *See Dutton v. Evans*, 400 U.S. at 96 (Harlan, J., concurring) ("[t]he [confrontation] clause is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence."). Both the Court and individual justices have frequently observed as well that the Confrontation Clause should not be interpreted in a way that would curtail development of the law of evidence. *See, e.g., Ohio v. Roberts*, 448 U.S. at 64-65; *Dutton v. Evans*, 400 U.S. at 80, 86 n.17; *id.* at 95-96 (Harlan, J., concurring); *California v. Green*, 399 U.S. at 171-72 (Burger, C.J., concurring).

Finally, if the hearsay exceptions that are not conditioned upon a showing of unavailability are not presumptively harmonious with the Confrontation Clause, this Court will eventually be forced to examine all such exceptions with respect to the question of unavailability,

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[7] If limited solely to the facts of this case, Petitioner's proposed rule would, oddly enough, require courts to develop a separate body of hearsay principles applicable only to non-testifying victims in child sexual abuse prosecutions.

including the firmly rooted ones. This would be a duplicative and time-consuming process, found by the Court to be unnecessary with respect to the question of reliability where the evidence falls within a firmly rooted hearsay exception. *Roberts*, 448 U.S. at 66; *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987) (independent indicia of reliability not required when hearsay statement falls within exception for co-conspirator statements).

C. An Unavailability Requirement for All Hearsay Exceptions Used in Child Sexual Abuse Cases Would Offer No Significant Benefit, But Would Place Significant Burdens on the Prosecution and the Criminal Justice System.

In *Roberts*, the Court noted that a demonstration of unavailability is not required where the utility of trial confrontation is remote. 448 U.S. at 65 n.7 (citing *Dutton v. Evans*). In *Inadi*, the Court also relied on this reasoning in concluding that the Confrontation Clause does not require the unavailability of the declarant before admitting co-conspirator statements.

First, the Court found that an unavailability requirement would not serve to actually exclude any evidence "unless the prosecution makes the mistake of not producing an otherwise available witness." *Inadi*, 475 U.S. at 396. In other words, if the declarant is truly unavailable, or is available and produced by the prosecution, his out-of-court statements are invariably admitted. Consequently, the Court continued, "the unavailability rule cannot be defended as a constitutional 'better evidence rule.' " *Id.* (Compare the so-called "best evidence" rule: " . . . the best evidence the nature of the case will admit . . . shall

always be required, if possible to be had; but if not possible then the best evidence that can be had shall be allowed." E. Cleary, *supra*, § 229, at 703.)

Second, the *Inadi* Court reasoned that an unavailability rule would not produce much testimony that "adds anything to the 'truth-determining process' over and above what would be produced without such a rule." *Id.* If the prosecution decides not to call the declarant, but the defendant still wants to secure the declarant's testimony, he has several options available. Specifically, the Sixth Amendment guarantees a defendant the right of compulsory process to obtain the presence of witnesses in his defense. *Id.* at 397. Also, under Federal Rule of Evidence 806, if the defendant does call the declarant as a witness, he is entitled to examine him or her on the statement as if under cross-examination. *Id.* The Court thus concluded that if the defense chooses not to subpoena such a declarant, "either as a witness favorable to the defense, or as a hostile witness, or for cross-examination under Federal Rule of Evidence 806, then it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant 'available.' " *Id.* at 398.

The reasoning of *Inadi* applies not just to co-conspirator statements, but to all admitted hearsay. Unless the State simply fails to produce an available witness, an unavailability rule never serves to actually exclude evidence. Moreover, the Compulsory Process Clause would assist any defendant in obtaining the testimony of a hearsay declarant whose statement was admitted against him. In Illinois specifically, if the declarant is unwilling or hostile, he or she may be examined by the defendant as if

under cross-examination. Ill. Rev. Stat. 1989, Ch. 110A, § 238 (made applicable to criminal cases by § 433). Similar provisions are followed by statute or court rule in many states. *See generally* 81 Am. Jur. 2d *Witnesses* § 494 (1976). Finally, most states have adopted rules identical or similar to Federal Rule of Evidence 806.[8] Accordingly, for the same reasons that the Court concluded that an unavailability requirement for co-conspirator declarants would not promote truth-finding, likewise, the truth-seeking process would not be enhanced by a general rule requiring the prosecution to assure the availability of all

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[8] The following states have rules comparable to Federal Rule of Evidence 806: Alaska: Alaska R. Evid. 806; Arizona: Ariz. R. Evid. 806; Arkansas: Ark. Unif. R. Evid. 806; California: Cal. Evid. Code § 1203; Colorado: Colo. R. Evid. 806: Delaware: Del. Unif. R. Evid. 806; Florida: Fla. Stat. § 90.806; Hawaii: Hawaii R. Evid. 806; Iowa: Iowa R. Evid. 806; Kentucky: Ky. R. Evid. 806; Louisiana: La. Code of Evid. art. 806; Maine: Me. R. Evid. 806; Michigan: Mich. R. Evid. 806; Minnesota: Minn. R. Evid. 806; Mississippi: Miss. R. Evid. 806; Missouri: Mo. R. Evid. 806; Montana: Mont. R. Evid. 806; Nebraska: Neb. Rev. Stat. § 27-806; Nevada: Nev. Rev. Stat. 51.069; New Hampshire: N.H. R. Evid. 806; New Mexico: N.M. R. Evid. 806; North Carolina: N.C. R. Evid. 806; North Dakota: N.D. R. Evid. 806; Ohio: Ohio R. Evid. 806; Oklahoma: Okla. Stat. tit. 12, § 2806; Oregon: Or. Evid. Code § 40.475; Rhode Island: R.I. R. Evid. 806; South Dakota: S.D. Codified Laws § 19-16-37; Tennessee: Tenn. R. Evid. 806; Vermont: Vt. R. Evid. 806; Washington: Wash. R. Evid. 806; West Virginia: W. Va. R. Evid. 806; Wisconsin: Wis. R. Evid. 908.06; and Wyoming: Wyo. R. Evid. 806.

children whose hearsay statements are introduced against the defendant in sexual abuse cases.

Such a rule would, however, impose significant burdens. First, the *Inadi* Court's concerns about the "substantial burden on the entire criminal justice system" (475 U.S. at 398) apply with equal or greater force to Petitioner's proposed rule. A constitutional rule mandating a determination of unavailability every time the prosecution seeks to admit a child's hearsay statement automatically adds another avenue of appellate review for defendants in the ever-growing number of sexual abuse cases.[9]

Moreover, an unavailability requirement in such cases places a significant practical burden on the prosecution. In every case involving the use of a child's prior out-of-court statements which disclose an alleged act of sexual abuse, the prosecution would be required to ensure the child's continuing availability for trial. In *State v. Sheppard*, the New Jersey Superior Court noted the following with respect to the difficulties attending the presentation of children's testimony in abuse cases:

> In most cases, prosecutions are abandoned or result in generous plea agreements, either because the child's emotional condition prevents [him or] her from testifying or makes the testimony obviously inaccurate or inadequate.

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[9] Between 1976 and 1985, the number of reported incidents of child maltreatment rose from .67 million to over 1.9 million (11.7% of the 1985 cases alleged sexual abuse). *Coy v. Iowa*, 487 U.S. 1012, 1031 (1988) citing to *Am. Ass'n for Protecting Children, Highlights of Official Child Neglect and Abuse Reporting* 1985, pp. 3, 18 (1987) (Blackmun, J., dissenting).

> One attorney, who had handled 30 to 40 of these cases for the State, was able to complete a trial in only one. In most, while the child victim was able to provide her with information sufficient to support a prosecution and was sometimes able to appear with difficulty before a grand jury, [he or] she could not testify in court face-to-face with the accused and other relatives. The victim either refused to testify or "froze" when she got to court. Children who did testify, *e.g.*, before a grand jury, frequently "forgot" details, changed stories, or presented inconsistent facts. Ultimately, many broke down, cried, ignored questions and eventually refused to answer.

197 N.J. Super. 411 at 417, 484 A.2d 1330 at 1333 (1984).

Finally, as the Court noted with respect to co-conspirator declarants in *Inadi*, an unavailability rule would impose these burdens regardless of whether either party actually desired to examine the child at trial. 475 U.S. at 399.

D. There Are Compelling Public Policy Reasons Why A Child's Out-of-Court Statements Are Admissible Without Regard to Availability.

Several important state interests would be furthered if the prosecution is not constitutionally required to produce an available child victim for trial before introducing his or her out-of-court statements in a sexual abuse case. Indeed, this would be accomplished without sacrificing the Confrontation Clauses' truth-seeking function.

The Court's precedents establish that "the Confrontation Clause reflects a preference for face-to-face confrontation at trial." *Roberts*, 448 U.S. at 63. This preference,

however, "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243.

The states possess several substantial interests with respect to the prosecution of child sexual abuse cases. Generally, a state has a strong interest in criminal justice; conviction rates for juvenile sex abuse cases remain strikingly low while reports of abuse continue to escalate annually. Recent Development, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 *Vand.L.Rev.* 1511, 1512 (1989). In addition, the State has a strong societal interest in the physical and psychological well-being of minors who are victims of sexual abuse. *Maryland v. Craig*, 497 U.S. ___, 110 S.Ct. 3157, 3167 (1990). Accordingly, the Court has held that, if the State makes an adequate showing of necessity,[10] it may resort to the use of special procedures implemented specifically for the purpose of allowing a child witness in an abuse case to avoid face-to-face confrontation with the defendant at trial. *Id.* at 3169.

The Court's precedents also recognize " 'a societal interest in accurate fact-finding which may require consideration of out-of-court statements.' " *Id.* at 3165, quoting *Bourjaily*, 483 U.S. at 182. The Court has attempted to

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[10] Because the necessity is based *solely* on furthering the state interest in protecting child witnesses from testifying in *the presence of the defendant* in a child abuse case, the requisite finding must be a case-specific one in which the trial court concludes that the particular child witness who seeks to testify would be traumatized by testifying in the presence of the defendant. *Craig*, 110 S.Ct. at 3169 (emphasis added).

harmonize this interest with the goals of the Clause – one of which is also to promote the truth-seeking process in criminal trials.

If the prosecution is not required to produce available child hearsay declarants in sexual abuse cases, the state interest in preventing trauma to child witnesses in such cases is obviously furthered. At the same time, however, the accuracy of the evidence before the trier of fact is enhanced, thereby advancing both the societal interest in accurate fact-finding and the truth-seeking goal of the Clause. Indeed, the Court has recognized that "where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal." *Craig*, 110 S.Ct. at 3169 (emphasis in original; citations omitted). *See also* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 *Colum. L. Rev.* 1745, 1751-52 (1983); Recent Development, *supra*, 42 *Vand. L. Rev.* at 1513.

There are other compelling reasons why admitting a child declarant's out-of-court statements, without regard to availability, promotes accurate fact-finding. A growing body of academic literature buttresses many jurists' conclusion[11] that a child's in-court testimony fails to reproduce a significant portion of the evidentiary value of his or her out-of-court statements. The child may have difficulty testifying at trial due to fading memory,[12] as well as

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[11] *See e.g., Nelson v. Farrey*, 874 F.2d 1222, 1230 (7th Cir. 1989).

[12] A.D. Yarmey, *The Psychology of Eyewitness Testimony* 204-05 (1979) (children posses inferior long-term and short-

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guilt or fear, particularly when the abuser is a parent or relative who may have, over time, extracted a promise of secrecy from the ambivalent child by using coercion, threats, subtle persuasion, or bribes.[13] Thus, the account given closer in time to the actual event is likely to be the more accurate. Moreover, given the impressionable nature of children, use of the prior, more contemporaneous account decreases the chances that any intervening outside influence by an adult was exerted over the child.[14] Indeed, it should be noted that due to the unique circumstances surrounding a child's in-court testimony, especially in a sexual abuse case, his or her out-of-court statements are comparable, in terms of probative value, to the statements of co-conspirators analyzed in *Inadi*.

Finally, because many children are unable to testify in open court, or are so overwhelmed on the witness

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term memories when compared to adults); Stevens & Berliner, *Special Techniques for Child Witnesses, The Sexual Victimology of Youth* 246, 254 (L. Schultz ed. 1980) (child's memory of detail blurs quickly). *But see* Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 *J.Soc.Issues* (no. 2) 33, 34, 36 (1984) (there is considerable evidence that children typically recall less than adults, but available evidence does not necessarily support assertion that "forgetting occurs more rapidly in children.").

[13] *Sexual Assault of Children and Adolescents* 85-98 (A.W. Burgess ed. 1978).

[14] *See* Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, *72 Minn. L. Rev.* 523, 532 n.39 (1988) (suggestiveness by an authority figure, especially a parent involved in a custody dispute, should not be underestimated).

stand as to prevent the possibility of effective testimony, rates of conviction for child sex abuse cases will remain low unless the prosecution is able to resort to the use of a child's out-of-court statements – which often constitute the only proof of the crime,[15] – without regard to availability. In essence then, an unavailability rule, as Petitioner proposes, would prevent the efficient and effective prosecution of child abusers and ultimately result in the impediment of the State's significant interest in criminal justice.

E. Not Only Legal Precedent, but Practicality Requires that this Court Reject Petitioner's Proposed "Rule of Necessity."

In sum, it is the admission of hearsay which amounts to nothing more than a "weak substitute for live testimony" that disserves the symbolic and truth-seeking goals of the Confrontation Clause. Accordingly, such hearsay requires an inquiry into unavailability in that it can only be used when use of live testimony is not possible.

The hearsay statements admitted in this case have never been considered "weak substitutes for live testimony." Both spontaneous declarations and statements made for purposes of medical treatment gain their probative value from the circumstances in which they are made. Consequently, the use of such statements has never been conditioned upon the unavailability of the declarant.

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[15] *See* Note, *supra*, 83 *Colum. L. Rev.* at 1749.

Moreover, due to the unique circumstances surrounding a child's in-court testimony, especially as the complainant in a sexual abuse case, his or her out-of-court statements, made closer in time to the actual event, have probative value which will most likely not be duplicated on the witness stand. The situation in the case at bar buttresses this assertion. S.G. was apparently so emotionally distraught by the time she was called to testify that she could not even take the stand, let alone give adequate testimony.

From a practical standpoint, it must be kept in mind that if this Court adopts a rule such as Petitioner proposes, all of the federal and state hearsay exceptions, as well as their common-law antecedents, would violate the Constitution, not only in child sexual abuse cases, but most likely in all criminal cases. In light of the fact that an unavailability requirement for all hearsay exceptions, even if limited to child abuse cases, would offer no significant benefit, but would place considerable burdens on the prosecution and the criminal justice system, such a rule should be rejected.

Finally, Petitioner does not dispute the trial court's conclusion that S.G.'s out-of-court statements fell within the common law hearsay exceptions for spontaneous declarations and the Illinois statutory exception for statements made to medical personnel for purposes of treatment or diagnosis. Indeed, the admissibility of the evidence under state law is not the issue here; rather the question is whether, because S.G. did not take the stand, nor was she declared "unavailable" by the trial court, the admission of her hearsay statements denied Petitioner his rights under the Confrontation Clause. As fully set out

above, the use of these two exceptions has never been conditioned upon a showing of unavailability; nor does the Confrontation Clause require that it must.[16] Therefore, assuming, *arguendo*, that the prosecution did not make a showing of unavailability in this case, the admission of S.G.'s out-of-court statements did not violate Petitioner's sixth amendment right to confrontation.

II. IF PROOF OF UNAVAILABILITY IS REQUIRED FOR ADMISSION OF SPONTANEOUS DECLARATIONS AND STATEMENTS MADE TO MEDICAL PERSONNEL FOR PURPOSES OF TREATMENT OR DIAGNOSIS, THE STATE MADE A "GOOD-FAITH EFFORT" TO CALL THE DECLARANT AS A WITNESS, ONLY TO FIND THAT SHE WAS EMOTIONALLY OR PSYCHOLOGICALLY "UNAVAILABLE."

If the Petitioner is correct in his assertion that the State may not introduce spontaneous declarations or

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[16] These two exceptions are firmly rooted in that they "possess the imprimatur of judicial and legislative experience." *Idaho v. Wright*, 497 U.S. ___, 110 S.Ct. 3139, 3147 (1990). However, that is not to say that a showing of unavailability is always required in cases in which the prosecution must show the "particularized guarantees of trustworthiness" of hearsay which does not fall within a well-recognized hearsay exception. Indeed, it appears that such a particularized showing of reliability can be made without regard to unavailability. *See Lee v. Illinois*, 476 U.S. at 548 n.2 (Blackmun, J., dissenting) (custodial confession, which is presumptively unreliable, is more like prior judicial testimony than like co-conspirator statements, and thus both unavailability and reliability requirements of *Roberts* must be satisfied). This is important in child sexual abuse cases in that the hearsay statements of children do not always fit within firmly rooted hearsay exceptions.

statements made to medical personnel for purposes of treatment or diagnosis without producing the declarant or showing his or her unavailability, Petitioner was still not denied his sixth amendment rights in this case. Indeed, the prosecution made a sufficient showing of unavailability.

Acting under the assumption that "the Confrontation Clause generally requires a showing of unavailability," (*Ohio v. Roberts*, 448 U.S. at 66), jurists and scholars have considered the admissibility of the out-of-court statements of non-testifying children. Many have found psychological unavailability satisfactory to meet the Roberts unavailability requirement. *See, e.g., State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 813 (1987) (affirming trial court's finding of unavailability because of existing mental infirmity based solely on expert testimony "indicating the [child] would be uncommunicative if asked about the assault and could be further traumatized by courtroom proceedings"); *Glendening v. State*, 503 So.2d 335, 337 (Fla. Dist. Ct. App. 1987) (upholding special hearsay statute with unavailability provision for absence due to substantial likelihood of severe emotional or mental harm); *Altmeyer v. State*, 496 N.E.2d 1328, 1331 (Ind. App. 1 Dist. 1986) (finding child unavailable, though competent, because trial "participation would be a traumatic experience"); *People v. Johnson*, 146 Ill.App.3d 640, 497 N.E.2d 308, 312 (Ill.App. 5 Dist. 1986) (child witness who is physically present is nevertheless "unavailable" for confrontation purposes if psychologically unable to testify); *see also* Comment, *Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 *J.Juv.Law* 59, 70 (1984) (concluding that "child's incompetence or refusal to

answer questions when on the stand does not preclude such admission [of hearsay] and can, therefore, be considered equivalent to legal unavailability").

The Confrontation Clause also requires that the prosecution make a "good-faith effort" to obtain the presence of the declarant at trial. *Ohio v. Roberts*, 448 U.S. at 74. The ultimate question is whether the witness is unavailable depite the "good-faith efforts" undertaken prior to trial to locate and present that witness. *Id.*

In the instant case, the State clearly made a "good-faith effort" to present S.G. as a witness; she was called to the witness stand twice. However, the child was emotionally unavailable to testify. At that time, defense counsel acknowledged that S.G. did not testify because she was emotionally distressed. (J.A. 14)

This Court has made it clear that "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. at 74. As is apparent from the record in this case, the calling of S.G. as a witness was just such an act. The law required nothing more of the State.

If, as Petitioner suggests, the trial court was obligated to make a "case-specific finding of necessity," the State should be given an opportunity to prove unavailability on remand before Petitioner is granted a new trial. Requiring a new trial without a remand hearing would needlessly penalize society, as well as waste judicial and prosecutorial resources if, upon remand, the State is able to show that S.G. was indeed unavailable. In such case, her out-of-court statements were properly admitted and thus there would be no need for a new trial. If S.G. was in fact unavailable, as Respondent maintains she was,

allowing the prosecution to prove her unavailability after the introduction of her statements, as opposed to before, does not in any way alter the proof of Petitioner's guilt.

CONCLUSION

For all of the foregoing reasons, the People of the State of Illinois respectfully request that the decision of the Appellate Court of Illinois, Fourth Judicial District, be affirmed.

Respectfully submitted,

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